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Supreme Court of the United States

OCTOBER TERM, 1967

No. 661, MISC.

BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,
Petitioner,

v.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, ET. AL.,
Respondents.

BRIEF OF RICHARD JOYCE SMITH AND WILLIAM J. KIRK, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, IN OPPOSITION TO MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS AND TO PETITION FOR A WRIT OF MANDAMUS

JAMES WM. MOORE
ROBERT W. BLANCHETTE
54 Meadow Street
New Haven, Conn. 06506
Of Counsel

JAMES GARFIELD
30 State Street
Boston, Massachusetts
02109
Attorney

October 11, 1967

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QUESTION PRESENTED

In dismissing petitioner's appeal "for want of diligent prosecution," did the United States Court of Appeals for for the First Circuit abuse its discretion and depart from sound judicial conduct so as to warrant the Supreme Court in issuing the extraordinary writ of mandamus?

STATEMENT OF THE CASE

The proceeding at bar grows out of the reorganization of the Boston and Providence Railroad Corporation (B&P) under Section 77 of the Bankruptcy Act.

The B&P has been in reorganization in the United States District Court for the District of Massachusetts since 1938 — 29 years.

On March 11, 1966, a Plan of Reorganization was approved by the Interstate Commerce Commission (327 I.C.C. 10) and, as shown in the Reorganization Court's docket, was certified to the United States District Court for the District of Massachusetts on June 3, 1966.*

In its Report approving the plan, the Commission noted that the "Development Group represents the views of only two minority stockholders, rather than all original members of the Group. . . ." (327 I.C.C. 10, at 12).

On November 8, 1966, following a hearing on objections to the plan, the district court rendered an opinion approving the plan in all respects and providing for classification of creditors and stockholders (260 F. Supp. 415). It noted that petitioner was the only objector to the plan and concluded that the plan "represents a solution which all interested parties, except a minuscule dissident minority, are willing to accept as fair and reasonable." (260 F. Supp. 415, at 423). Decrees were entered on November 21, 1966.

On December 1, 1966, petitioner filed a motion for a new trial and other relief. On December 7, the district court denied this motion.

On January 6, 1967, petitioner filed a notice of appeal from the order approving the plan and from the denial of its motion for a new trial.

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*Petitioner's successful attempts to frustrate a plan which had been approved in 1954 (see 327 I.C.C. 10, at 11) are set out in Appendix A.

On February 15, 1967, the Clerk of the Court of Appeals notified all parties that petitioner's designation regarding printing and statement of points to be relied upon would have to be filed by February 23, and its brief and record appendix by March 22. On February 18, petitioner moved for a thirty day extension for all of these matters; on February 23, the three appellees (the B&P Debtor, the Stockholders' Committee and the New Haven Trustees) filed a memorandum in opposition to the motion. On February 24, the Court denied petitioner's motion for extension.

On February 27, appellant having failed to make the February 23d filings, the three appellees moved for dismissal of the appeal or affirmance of the lower court's judgment. This motion objected to postponement and highlighted petitioner's failure to comply with the Clerk's notice.

On March 1, petitioner filed a memorandum opposing the motion for dismissal or affirmance, and moved for an extension of time until March 10 to designate additional parts of the record. On March 2, the Court of Appeals denied appellees' motion for dismissal or affirmance and gave the petitioner until March 10 to designate supplemental parts of the record. On March 10, petitioner filed a supplemental statement of some parts of the record to be printed, stating that the "remaining designations will be furnished as soon as possible."

On March 21, the day before the brief was due, petitioner filed another motion to permit the use of the record on an earlier appeal instead of printing portions of the record and to extend the time for filing its brief and record appendix until March 31.

On March 23, the appellees filed a second motion for dismissal or affirmance again calling attention to the urgency of the matter and the need for expedition and stating that petitioner had been twice warned of the necessity for filing its brief and record appendix on March 22, that for the sec-

ond time within a month petitioner had waited until it was actually in default under the Court's Rules and Orders before seeking an extension of time, and that on the very day when its brief was due, petitioner had served upon appellees another motion to extend the time for such filing and to be relieved of its prior agreement to print parts of the record.

On March 24, the court denied the motion relative to printing and extension of time.

On March 28, petitioner filed a motion for reconsideration of such denial, repeated its request for an extension of time and filed a memorandum in opposition to appellees' second motion for dismissal or affirmance.

On March 29, the court entered its "Memorandum and Order" stating that it had considered appellant's motion for reconsideration of the denial of its motion for enlargement of time, appellees' second motion to dismiss and appellant's memorandum in opposition thereto. The reasons given for such opposition were enumerated in the Court's Memorandum and were expressly held to be inadequate. The appeal was thereupon "dismissed for want of diligent prosecution".

On April 12, petitioner filed for rehearing and, two days later, without consent of the Court, filed incomplete galley proofs of its brief.

On April 18, 1967 the Court entered a second "Memorandum and Order" in which it discussed fully the allegations contained in the petition for rehearing and brief and denied the petition. The April 18th Memorandum, on April 25th, became the Mandate to the District Court.

ARGUMENT

The Court of Appeals properly dismissed petitioner's appeal for want of diligent prosecution. To do otherwise would have countenanced petitioner's then latest attempt to delay the reorganization by abuse of legal process.

Notwithstanding its sonorous title, petitioner represents a "minuscule dissident minority" (260 F. Supp. 415, 423), which for some 13 years has steadfastly opposed all responsible attempts to conclude the most protracted railroad reorganization proceeding since the enactment of Section 77 of the Bankruptcy Act.

Except for a small and apparently shifting minority,[1] petitioner does not act on behalf of the public stockholders of the Boston and Providence Railroad Corporation (B&P), who support the plan which petitioner seeks to undermine. Its acts are those of a few individuals who, by refusing any compromise, are willing to gamble recklessly on the destruction of the public stockholders' equity, and to risk frustration of the public interest in continued rail operations, in the dim prospect of an all-or-nothing financial victory.

Since its formation, petitioner has resorted continuously to the devices of obstruction and delay (See Appendix A). Its present efforts are directed to the prevention of confirmation of the plan within 18 months after the Commission's certification. This would lay the groundwork for a further effort to resubmit the plan to the Commission under 11 U.S.C. 208.[2]

Sound judicial administration requires the prosecution of appeals with dispatch and orderliness. The prevailing

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[1] In its last Report, the Commission could find that the Development Group's objections were subscribed to by only two of its members (327 I.C.C. 10, at 12). The Reorganization Court found at least one, and, even accepting petitioner's claim, at most, five or six shareholders (260 F. Supp. 415, at 419).

[2] Petitioner has already so petitioned the District Court for the District of Massachusetts, although prematurely, by petition dated September 12, 1967. The petition was denied on September 19, 1967, and a motion for reconsideration was filed on September 29.

parties in the lower court are entitled to a prompt determination of any appeal; this is especially the case in a railroad reorganization where the public interest as well as private rights are involved. Unlike dismissal of a complaint in a *nisi prius* court, petitioner has already been heard fully on the merits before the Commission and the Reorganization Court and its claims found meritless. Further, dismissal of the appeal does not foreclose any right, since the all-important vote of creditors and stockholders, in the process of being taken, will determine what views the parties with the substantial interests at stake hold of the plan. Subsequent to the vote, a full hearing on the merits will be had in the Reorganization Court to determine whether the plan should be confirmed.

In view of the fact that the interests of all other parties were being jeopardized by delay, as they had been in 1954, the Court of Appeals properly refused to permit petitioner to press his appeal at his own calculated leisurely pace and in utter disregard of the court's rules and orders.[3] The court merely imposed upon petitioner the rules of appellate practice required of all litigants. In fact, over objections, it granted petitioner one extension for furnishing a supplemental designation of the record and denied appellees' first motion for dismissal or affirmance. The recitations of facts contained in the First Circuit's memoranda of March 29 and April 18, 1967 demonstrate fully and objectively the unreasonableness of the demands which petitioner was making.

Petitioner's strategy of delay has already frustrated one plan of reorganization for this Debtor (See Appendix A) and was known to the Court of Appeals (*Freeman* v.

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[3] Petitioner's proclivity for tailor-making its own rules persists in this Court. Thus, its petition for certiorari (No. 624) does not even pretend to set forth any basis for the granting of the writ, but merely refers to its petition for mandamus (No. 661, Misc.), which petitioner had filed with the Clerk of this Court one day prior to the filing of the petition for certiorari.

Mulcahy, 250 F.2d 463, 470-71 (1st Cir. 1957)). The First Circuit properly refused to sanction further steps directed to that end.

Under the attendant circumstances, this Court should not sustain the motion for leave to file a petition for writ of mandamus. In the words of this Court's Rule 30: "The issuance by the court of any writ authorized by 28 U.S.C. §1651 (a) is not a matter of right but of sound discretion sparingly exercised."

Petitioner had an adequate remedy by certiorari to review the narrow question of whether the Court of Appeals had properly dismissed its appeal. After obtaining two extensions of time to file its petition for a writ of certiorari, petitioner stated no grounds for the grant, and in this mandamus proceeding, states no reasons why the ordinary remedy of review by certiorari is inadequate. In this proceeding, petitioner has appended a brief on the merits (never properly filed in the Court of Appeals) which it could not have annexed or appended in the certiorari proceeding under S. Ct. Rule 23.3. The brief should be disregarded.

CONCLUSION

For the foregoing reasons, the Trustees of the property of The New York, New Haven and Hartford Railroad Company urge that the motion for leave to file a petition for a writ of mandamus be denied and that no writ issue.

Respectfully submitted,

JAMES WM. MOORE
ROBERT W. BLANCHETTE
Of Counsel
54 Meadow Street
New Haven, Conn. 06506

JAMES GARFIELD
30 State Street
Boston, Massachusetts
02109
Attorney for Richard Joyce Smith and William J. Kirk, Trustees of the property of The New York, New Haven and Hartford Railroad Company.

October 11, 1967

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing brief upon all parties of record in this proceeding by depositing in the United States Post Office at Boston, Massachusets, with first-class postage prepaid, a copy thereof properly addressed to counsel of record for each of the said parties at his post office address.

Dated at Boston, Massachusetts, this 11th day of October, 1967.

JAMES GARFIELD
30 State Street
Boston, Massachusetts 02109

APPENDIX A

DILATORY TACTICS OF THE BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP

In its opinion of December 9, 1957, affirming Judge Ford's approval of the 1954 plan, the Court of Appeals made the following comments on the events following the Commission's approval of the plan (*Freeman* v. *Mulcahy,* 250 F. 2d 463, 470-471):

"No petitions for modification of this plan were filed until March 8, 1954, when the appellants, Barton et al., giving themselves the somewhat sonorous title of The Boston & Providence Railroad Stockholders Development Group, appeared on the scene with a petition for leave to intervene coupled with a petition for modification of the plan. The Commission accorded the Group recognition and thereafter it has taken a very active part in these proceedings. It filed numerous motions and petitions during the spring and summer of 1954, all of which the Commission denied except one asking leave for all parties to file briefs on the significance in this proceeding of the decision of the Supreme Court in *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U. S. 298, handed down on April 5, 1954. The Group also brought a suit in the United States District Court for the Eastern District of Virginia, Alexandria Division, against the Commission and the United States, in which New Haven intervened, for the purpose of compelling the Commission to establish divisions of joint freight rates between B&P and New Haven. In that suit the Group was unsuccessful on the ground that the matter had already been thoroughly canvassed by the Commission and the Court of Appeals for the Second Circuit. See *Group etc.* v. *Interstate Commerce Commission,* 133 F. Supp. 488 (1955), affirmed,

350 U. S. 926 (1956), rehearing and reconsideration as to costs[7] denied. 350 U. S. 985 (1956).

"Eventually, on July 30, 1954, the Commission filed a fifth supplemental report wherein, we think quite properly, it held the rule of the *St. Joe Paper Company* case inapplicable, and wherein it also, after reconsidering the evidence in detail, affirmed its prior conclusions with respect to the price to be paid by New Haven for the B&P properties."

The proceedings referred to included those hereinafter listed, all of them initiated by the "Development Group." They resulted in a delay of two years before the District Court could act on the plan. (See 143 F. Supp. 866, 868)

Date Initiated	*Tribunal*	*Proceeding*	*Disposition*
1954			
Mar. 8	I.C.C.	Petition of intervention	Granted
Mar. 8	I.C.C.	Petition for modification of order of Jan. 5, 1954	Denied, July 30, 1954 —290 I.C.C. 404, 414
Mar. 18	I.C.C.	Complainant seeking divisions between B&P and NH (Docket 31489)	Dismissed, July 13, 1954 — see 290 I.C.C. 404, 405
Apr. 12	I.C.C.	Motion to file briefs on effect of *St. Joe* case on Jan. 5, 1954 plan	Motion granted Apr. 16, 1954, but *St. Joe* case found inapplicable — 290 I.C.C. 404-409
Apr. 26	I.C.C.	Petition to intervene in Finance Docket 18347 for trackage rights over NH	Denied, July 7, 1954

"[7] The Virginia Court, being of the opinion that the Development Group's action was 'oppressive and vexatious,' had ruled that New Haven was entitled to an attorney's fee of $1,500 as well as to its statutory costs."

Date Initiated	*Tribunal*	*Proceeding*	*Disposition*
June 8	I.C.C.	Motion to suspend proceedings in Finance Docket 12131 pending disposition of Docket 31489	Denied, July 30, 1954 — 290 I.C.C. 404, 405
Aug. 26	I.C.C.	Petition to reconsider denial of June 8th motion	Denied, Nov. 15, 1954
Aug. 26	I.C.C.	Motion to advise Court in Mass. that B&P reorganization proceeding should be suspended until determination of issues in Docket 31489	Denied, Nov. 15, 1954
Sept. 13	I.C.C.	Petition to reconsider denial of April 26th petition in Finance Docket 18347	Denied, Oct. 18, 1954
Oct. 25	U.S.D.C. E.D.Va.	Bill of complaint to set aside I.C.C.'s refusal to grant the relief sought in I.C.C. Docket 31489 and to direct I.C.C. to establish divisions	Dismissed, Mar. 31, 1955—133 Fed. Supp. 488
1955			
Apr. 11	U.S.D.C. E.D.Va.	Motion for new trial and reconsideration	Denied, May 6, 1955
Apr. 29	U.S.D.C. E.D.Va.	Motion for postponement of Apr. 11th motion	Denied, May 6, 1955
May 18	U.S.D.C. Mass.	Petition to instruct B&P Trustee to intervene in Va. case	Granted, June 16, 1955 (though Va. complaint had already been dismissed)
June 22	U.S.D.C. Va.	Motion to supplement complaint	Denied, July 1, 1955
June 22	U.S.D.C. Va.	Motion to amend Court's opinion	Denied, July 1, 1955

Date Initiated	*Tribunal*	*Proceeding*	*Disposition*
June 22	U.S.D.C. Va.	Motion to amend Court's order of June 15, 1955, taxing costs to complainant	Denied, July 1, 1955
June 27	U.S.D.C. Va.	Motion for reconsideration of motion of April 11th	Denied, July 1, 1955
June 27	U.S.D.C. Va.	Motion for ex parte ruling on preceding motion or order shortening time	Denied, July 1, 1955
June 27	U.S.D.C. Va.	Motion for ex parte order to U.S. and I.C.C. to show cause why their responses to B&P Trustee's motion to intervene should not be stricken	Denied, July 1, 1955
July 5	U.S.D.C. Va.	Notice of appeal to U.S. Supreme Court from orders of Mar. 31st, May 6th, June 15th and July 1st	Appeals all denied, Jan. 9, 1956—350 U.S. 926
Aug. 29	U.S.D.C. Mass.	Motion to instruct B&P Trustee to join in appeals to U.S. Supreme Court	Denied, Aug. 29, 1955
1956			
After Jan. 9	U.S.Sup. Ct.	Petition for rehearing of appeals	Denied, Mar. 12, 1956 —350 U.S. 985
After Jan. 9	U.S.Sup. Ct.	Motion to clarify Supreme Court's order of Jan. 9, 1956	Denied, Mar. 12, 1956 — 350 U.S. 985
After Jan. 9	U.S.Sup. Ct.	Petition for reconsideration of dismissal of appeal from order taxing costs	Denied, Mar. 12, 1956 — 350 U.S. 985
May 11	U.S.D.C. Mass.	Motion to postpone hearing on plan or refer it back to Commission	Denied, July 24, 1956

Hearings on the plan were held before the District Court on May 15 and 16, 1956. Judge Ford handed down an opinion indicating approval of the plan on July 24, 1956, and entered a decree approving it on September 11, 1956.

Appeals were taken by the Development Group and two other parties, but only the Development Group took the following actions:

Date Initiated	*Tribunal*	*Proceeding*	*Disposition*
1956 Sept. 21	U.S.D.C. Mass.	Motions: (1) to amend findings and conclusions in opinion of July 24, 1956, approving plan, (2) for new trial, (3) for rehearing, (4) to amend decree of Sept. 11, 1956	Denied, Oct. 24, 1956
Oct. 10	U.S.D.C. Mass.	Letter to Judge Ford asking rehearing and proposing "Findings and Conclusions" (76 pages)	Denied, Oct. 24, 1956
Oct. 22	U.S.D.C. Mass.	"Offer of Proof"	
Nov. 23	U.S.D.C. Mass.	Notice of appeal from Order of Oct. 24, 1956	
1957 Jan. 15	U.S.D.C. Mass.	Motion to refer plan back to Commission	

The Court of Appeals on December 9, 1957, affirmed Judge Ford's decision approving the plan. Again only the Development Group took the following actions:

Date Initiated	*Tribunal*	*Proceeding*	*Disposition*
1957 Dec. 24	U.S.Ct. of App.	Motion to enlarge time for filing petition for rehearing	Denied, Dec. 30, 1957

Date Initiated	*Tribunal*	*Proceeding*	*Disposition*
1958			
Mar.	U.S.Sup. Ct.	Petition for certiorari	Denied, Apr. 28, 1958 — 356 U.S. 939
Apr. 23	U.S.Sup. Ct.	Motion for leave to file petition for rehearing of appeal from Va. Court	Denied, Apr. 28, 1958 — 356 U.S. 948
Apr.	U.S.Sup. Ct.	Petition for rehearing	Denied, June 9, 1958 — 357 U.S. 915
May 29	U.S.Sup. Ct.	Motion to extend time for petition for rehearing or to defer consideration and petition for rehearing of order of Apr. 28, 1958	
July 19	U.S.D.C. Mass.	Petition under 11 U.S.C. § 208(a)(1)	Referred to I.C.C. July 22, 1958—see 312 I.C.C. 120, 121
Sept.		"Corrected" motion under § 208	
Oct. 31	I.C.C.	Supplemental petition under § 208(a)(1)	See 312 I.C.C. 120, 121
1959			
Oct. 15	U.S.D.C. Mass.	Second Supplemental petition under § 208 (a)(2)	Referred to I.C.C. — 312 I.C.C. 120, 121

On March 7, 1960, the Commission issued its Sixth Supplemental Report recalling the plan under §208 (312 I.C.C. 120). A hearing was held on July 13, 1960, at which the New Haven informed the Commission's Examiner that its financial condition had become so precarious that it could no longer afford to purchase the Boston & Providence properties for cash or for new securities. The hearing was thereupon adjourned *sine die*. On July 7, 1961 the New Haven again went into reorganization under Section 77.

In November 1963, a modified plan of reorganization was filed by the Boston and Providence Railroad Stockholders'

Committee with the approval of the New Haven Trustees and the New Haven Reorganization Court. Hearings on that plan were held before an Interstate Commerce Commission Examiner in April and May, 1964, and on amendments, similarly proposed and agreed to, on March 9 and 10, 1965. The amended plan was approved by the Commission in March, 1966 and by the United States District Court in November, 1966, and is the plan now pending.

During and after that period the Development Group continued to interpose obstacles and create delay as shown in the following:

Date Initiated	*Tribunal*	*Proceeding*	*Disposition*
1960			
Oct. 17	I.C.C.	Request to file "Plan B"	Denied, Dec. 20, 1960
1964			
Jan. 23	I.C.C.	Motion to extend time for answers to Stockholders' Committee petition for hearing on modified plan	
Feb. 26	I.C.C.	Motion that hearings be postponed until after filing of joint report in Penn-Central merger case	Denied
Mar. 2	U.S.D.C. Conn.	Motion to intervene in NH reorganization proceeding and to participate as amicus curiae	Denied, Mar. 2, 1964
Mar. 20	U.S.D.C. Conn.	Notice of appeal	Appeal dismissed, by U.S. Ct. of App. 2d Cir., June 8, 1964, with costs and counsel fees
May 1	I.C.C. Examiner	Motion to adjourn hearings to June 2, 1964 (Rec. 2208)	Denied, May 1, 1964 — Rec. 2223

Date Initiated	*Tribunal*	*Proceeding*	*Disposition*
May 18	U.S.Ct. of App. 2d Cir.	Motion for extension of time for filing record on appeal	Denied, June 9, 1964
June 1	U.S.Ct. of App. 2d Cir.	Motion for "summary reversal" of District Court's order of Mar. 2, 1964	Denied, June 9, 1964
1965			
	I.C.C.	Petition to use Government attorney's memorandum as exhibit	Denied, Mar. 3, 1965
Mar. 3	I.C.C.	Letter requesting postponement of hearings on amended plan and to extend their scope	Denied by telegram, Mar. 4, 1965
Mar. 10	I.C.C.	Repeated requests to Examiner for further hearings	Denied, Mar. 10, 1965
1966			
July 28	U.S.D.C. Mass.	Motion to extend time to reveal Development Group's true representation	Time extended to Aug. 15, 1966
Aug. 19	U.S.D.C. Mass.	Statement re representation filed	
Sept. 7	U.S.D.C. Mass.	Petition for extension of time to file petitions for compensation	Time extended to Oct. 10, 1966
Oct. 20	U.S.D.C. Mass.	Petitions for compensation filed	
Dec. 1	U.S.D.C. Mass.	Motion for New Trial	Denied, Dec. 7, 1966
1967			
Jan. 6	U.S.D.C. Mass.	Notice of Appeal	Dismissed, Mar. 29, 1967

Date Initiated	*Tribunal*	*Proceeding*	*Disposition*
Feb. 15	U.S.Ct. App. 1st Cir.	Clerk's Notice fixing Feb. 23 as date for designation of parts of record to be printed and statement of points to be relied on, and Mar. 22 as date for brief and record appendage	
Feb. 18	U.S.Ct. App. 1st Cir.	Motion for 30-day extension of time for all of the above	Denied, Feb. 24, 1967
Feb. 24	U.S.Ct. App. 1st Cir.	Reply to Memorandum opposing Motion for 30-day extension	Denied, Feb. 24, 1967
Feb. 28	U.S.Ct. App. 1st Cir.	Statement of points to be relied on	
Mar. 1	U.S.Ct. App. 1st Cir.	Memorandum opposing appellees' motion to dismiss or affirm	
Mar. 1	U.S.Ct. App. 1st Cir.	Motion to enlarge time for designation for printing until Mar. 10	Granted Mar. 2, 1967
Mar. 2	U.S.Ct. App. 1st Cir.	Court's Order denying appellees' motion to dismiss or affirm and extending time for supplemental designation to Mar. 10	
Mar. 2	U.S.Ct. App. 1st Cir.	*Partial* designation for printing	
Mar. 10	U.S.Ct. App. 1st. Cir.	*Partial* designation for printing	
Mar. 21	U.S.Ct. App. 1st Cir.	Motion to be excused from part of printing and for extension of time for brief	Denied, Mar. 24, 1967

Date Initiated	*Tribunal*	*Proceeding*	*Disposition*
Mar. 28	U.S.Ct. App. 1st Cir.	Memorandum in opposition to second motion to dismiss or affirm	
Mar. 28	U.S.Ct. App. 1st Cir.	Motion for reconsideration of Mar. 24th denial of motion re printing and extension of time	Denied, Mar. 29, 1967
Apr. 12	U.S.Ct. App. 1st Cir.	Petition for rehearing	Denied, Apr. 18, 1967
Apr. 14	U.S.Ct. App. 1st Cir.	61-page incompleted brief	
July	U.S. Sup. Ct.	Request for extension of time to file petition for certiorari	Granted
Aug.	U.S. Sup. Ct.	Request for extension of time to file petition for certiorari	Granted
Sept. 12	U.S.D.C. Mass.	Petition to return plan to I.C.C. under §208	Denied, Sept. 19, 1967
Sept. 29	U.S.D.C. Mass.	Motion to reconsider denial of Sept. 19th	Pending